CAUSE NO. 13-19-00237-CR

IN THE COURT OF APPEALS
FOR THE
THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI-EDINBURG

DALLAS SHANE CURLEE,

APPELLANT,

VS.

STATE OF TEXAS,

APPELLEE.

On Appeal from Trial Court Cause Number 18-1-10,036;
In the 24th Judicial District Court of Jackson County, Texas
The Hon. Robert E. Bell, Judge Presiding.

APPELLANT, DALLAS SHANE CURLEE's, MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW, Appellant, DALLAS SHANE CURLEE, and files this, his **Motion for Rehearing** pursuant to Rule 49 *et. seq.* of the Texas Rules of Appellate Procedure and would respectfully show unto the Honorable 13th Court of Appeals as follows:

Appellant urges, along with the argument and citations made in his original brief on the merits and reply brief, that this Honorable Court of Appeals rehear this

matter and reconsider whether legally sufficient evidence in the record supports that the area where Appellant was arrested in this matter was "open to the public."

I.
PRIOR PROCEEDINGS

Appellant appeals the conviction and sentence imposed following his trial for "Possession of a Controlled Substance, in a drug free zone" a Third Degree Felony, punished in this case as a second degree felony for "repeat offender" status.

Appellant was formally charged in Cause No.18-1-10,036; *State of Texas v. Dallas Shane Curlee;* In the 24th Judicial District of Jackson County, Texas, in a single count indictment. The indictment in this cause was filed with the Jackson County District Clerk on, or about, January 24, 2018. [CR-4]. More specifically, Appellant was charged in the indictment as follows: "intentionally and knowingly possessing a controlled substance, to wit: Methamphetamine, in an amount by aggregate weight of more than 1 gram but less than 4 grams and said offense occurred in, on or within 1000 feet of a playground to wit: First United Methodist Church, 216 W. Main Street, Edna, Jackson County, Texas." [CR-4].

On, or about, April 22, 2019, Appellant's jury trial began with *voir dire*. [RR-III-]. Appellant's trial continued from that day until it was completed with punishment and pronouncement of sentence.

On, or about April 23, 2019, the indictment in this cause was read before the jury including the drug free zone language, but not the enhancements paragraphs. [RR-IV-7-8]. Appellant pled "not guilty" to the charge before the jury. [RR-IV-8].

The charge on guilt/innocence that went to the jury included the possession offense and "Special Issue Number 1" concerning whether the State proved beyond a reasonable doubt that the offense of possession was committed within a drug free zone. [CR-113]. On, or about April 24, 2019, after considering the arguments of counsel and the evidence presented by both parties during the guilt/innocence phase of the trial, the jury found Appellant "guilty" of the offense as charged in the indictment in this matter and finding Special Issue No. 1 in the affirmative. [CR-112-113; 120-123; RR-V-54].

On, or about, April 24, 2019, after considering the arguments of counsel and the evidence presented by both parties during the punishment phase of the trial, the jury assessed Appellant's punishment as the maximum amount of imprisonment in the Institutional Division of the Texas Department of Criminal Justice allowed in this case of twenty (20) years, and costs of court. [CR-118; 120-123; RR-V -119-121].

The Trial Court indicated in its "Trial Court's Certification of Defendant's Right of Appeal" that this matter was not a plea bargain case, and that Appellant had the right to appeal. [CR-119].

Appellant's Motion for New Trial was timely filed. [CR-152-177]. A motion requesting a setting on Appellant's Motion for New Trial was subsequently filed. [CR-178-179]. The Trial Court denied the motion for new trial without a hearing. [CR-180].

Appellant's Notice of Appeal was timely filed. [CR-126]. Appellant's appeal proceeded with briefing. Following the briefing in this case, the Honorable 13th Court of Appeals considered Appellant's appeal by submission. The Honorable 13th Court of Appeals issued an opinion on, or about, April 30, 2020, affirming Appellant's conviction.

Appellant timely files this Motion for Rehearing in accordance with and pursuant to T.R.A.P. 49.1.

II.
POINT(S) FOR REHEARING

Appellant respectfully disagrees with the opinion in this appeal regarding the drug free zone issue as presented in his briefing to this Honorable Court. As such, Appellant respectfully asks this Honorable Court of Appeals to rehear and reconsider the decision rendered April 30, 2020.

More specifically, Appellant asks this Honorable Court of Appeals to analyze the drug free zone issue and consider whether the area where Appellant was charged with possessing methamphetamine was proven to be "open to the public" by legally sufficient evidence and publish the opinion.

Point for Rehearing One:

This Honorable Court of Appeals should analyze, make a finding and conclusion as to the "open to the public" issue Appellant has raised, and publish the opinion.

In overruling Appellant's second issue, the Court's analysis and ultimate conclusion and finding appears to rely upon 1) evidence supporting the distance from the area in question as well as 2) the photographs showing fencing and play equipment. Appellant has raised the issue of whether the appellate record supports the conclusion or finding that the area in question is a "playground" because it was "open to the public." Respectfully, Appellant urges this Honorable Court to analyze whether the record contains legally sufficient evidence to support the second part of the definition of "playground" found in TEX. HEALTH & SAFETY CODE ANN §481.134(a)(3)(B). Without this analysis and a finding or conclusion, the Court's opinion could be construed to implicitly say that "open to the public" is not a necessary finding or a superfluous part of the definition of "playground." In the alternative, that the Court disagrees with the *Ingram* court that the term

"playground" as defined by the applicable statute, does not contain a presumption that a play area is "open to the public." *Ingram v. State*, 213 S.W.3d 515 (Tex. App.—Texarkana 2007, no pet.).

As the Court correctly points out, there are three parts of the definition of a "playground." *Curlee v. State*, opinion at 7, (Tex. App.—Corpus Christi, April 30, 2020)(memo. op.)(citing TEX. HEALTH & SAFETY CODE ANN §481.134(a)(3)). It appears from the plain text of the definition that all three requirements should be met, including §481.134(a)(3)(B) which reads: "is open to the public; ***and***…." *See* §481.134(a)(3)(emphasis added). The "and" suggests that all three parts of the definition must be met to prove that an area is a "playground," rather than each individual part supporting the finding of "playground" in and of itself. At least one sister court, in a published opinion, has found that there is no presumption with respect to "open to the public." *Ingram v. State*, 213 S.W.3d 515, 518-520 (Tex. App.—Texarkana 2007, no pet.). Another published opinion discussed in the briefing in this case, *Graves v. State*, does not seem to contradict the *Ingram* court on this point. *See Graves v. State*, 557 S.W.3d 863, 867 (Tex. App.—Houston [14th Dist.]. 2018)

In this case, Appellant has contended that there was no direct evidence presented by a competent witness to the jury that the area in question located at the First United Methodist Church is "open to the public." Appellant has also argued

that there is no evidence that could lead to the reasonable inference as to "open to the public" without the need for speculation. Without meeting all three of the parts of the definition concerning "open to the public," Appellant argues that the drug free zone enhancement does not survive legal sufficiency scrutiny.

Admittedly, the approach to analyzing whether there is legally sufficient evidence proving beyond a reasonable doubt that an area is "open to the public," and especially in the context of this case, is difficult to pinpoint. There appears to be little precedent in Texas jurisprudence for how an appellate court in Texas should analyze this issue and what facts must be shown to sustain the State's burden. Both Appellant and the State were only able to point to two published cases, from sister courts, which seemed to reflect the issue in this appeal. Both Appellant and the State addressed both of them in their respective briefing in this case. Neither Appellant, nor the State, cited any guidance from the Court of Criminal Appeals, nor was any cited in the opinion issuing from this Honorable Court.

After reviewing the quality of the evidence produced by the State and contained in this record, this Honorable Court of Appeals should conclude, as did the Texarkana Court of Appeals in *Ingram*, that the evidence is insufficient to support the jury's finding as to Special Issue 1 in the guilt/innocence charge, the drug free zone finding. *See Ingram v. State*, 213 S.W.3d 515 (Tex. App.—Texarkana 2007, no pet.). As argued in Appellant's prior briefing and incorporated herein by reference, the *Ingram* case seems to match closest with the issue in this

appeal. It simply is the State's burden to prove all three parts of the definition of playground. It is also the State's burden to prove that a "playground" is "open to the public" without allowing a jury to presume that it is.

Because the State chose to include the drug free zone enhancement during the guilt/innocence phase and went to the jury with the charge including the special issue with respect to the drug free zone allegation, the State was obligated to prove the enhancement beyond a reasonable doubt. At the very least, the inclusion of the drug free zone enhancement changes the parole eligibility in this case, and is therefore harmful. As the State failed to carry her burden, this Honorable Court should reverse and render the conviction in this case, or modify Appellant's judgment to remove the drug free zone finding and/or return the case to the trial court for a new trial without the drug free zone enhancement.

III.
CONCLUSION AND PRAYER

WHEREFORE, Appellant respectfully requests that this Honorable Court of Appeals rehear and reconsider this matter, the record and prior briefing on file in this cause, and after rehearing and reconsideration, find that the State failed to prove all the necessary facts beyond a reasonable doubt that the area in this case is a "playground" because it failed to prove the area in question was "open to the public" in this matter entitling Appellant to reversal and acquittal, reformation of the judgment in this case, or a new trial, *in toto* or for a new punishment hearing.

Appellant respectfully requests any further relief that he may be entitled to in law, or in equity.

Respectfully submitted,

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IV.
CERTIFICATE OF COMPLIANCE

I certify that the following document utilizes 14 point font for text and 12 point font for footnotes. I further certify that the word count in this document for those matters not excluded by Rule 9.4 is 1,692 words.

Luis A. Martinez

V.
CERTIFICATE OF SERVICE

I certify that a true, correct and complete copy of the foregoing motion for rehearing was served upon the Hon. Douglas K. Norman by electronic mail on the 15th day of May, 2020.

Luis A. Martinez

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